

**Maria Rochele Silva Sarabia v Registrar of Lands and Surveys
& Anor** A

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO
KCH-24-7/1 OF 2015 B
ALWI ABDUL WAHAB JC
24 AUGUST 2015

*Land Law — Sale of land — Caveat — Land purchased from vendor sold to
third party pursuant to auction — Caveat entered on land — Land Registrar
registered transfer of land — Caveat still in existence — Whether caveat to be
arbitrarily and unilaterally removed — Whether plaintiff deprived of equitable
interest over land — Sarawak Land Code (Cap 81) ss 175, 177 & 197* C
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The plaintiff, a Philippines citizen, had entered into a sale and purchase agreement ('the SPA') with one Pang Neng Ung ('the vendor') for the purchase of a plot of land ('the said land') at the purchase price of RM338,000. The vendor had charged the said land to American International Assurance Company Ltd ('the chargee') registered with Kuching Land Registry Office ('the said charge'). When the vendor defaulted in his loan, the chargee obtained an order for sale of the said land to satisfy the sum due and owing to the chargee. The plaintiff told the chargee to redeem the said land and proposed to pay the balance of the purchase price of RM300,000. However, there was no reply from the chargee. Subsequently, the plaintiff lodged a caveat over the said land. By a court's order, the said land was sold for the sum of RM373,838 and transferred to one Jackson Pui Nyan Tat ('the purchaser'). The registrar of the lands and surveys ('the first defendant') registered the memorandum of transfer ('MOT') with Kuching Land Registry Office. The plaintiff argued that the first defendant's act of registering the MOT in favour of the purchaser was wrongful as the plaintiff's equitable interest in the said land was completely extinguished under the SPA and she was deprived of her equitable interest in the said land. The plaintiff sought a declaration that the State Government of Sarawak ('the second defendant') was liable to compensate the plaintiff for the loss or deprivation of her equitable interest on the said land as a result of the first defendant's act pursuant to s 197 of the Sarawak Land Code ('the Code'); and an order for payment of compensation in the sum of RM292,000. E
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Held, allowing the application with costs of RM5,000: I

- (1) When the registrar proceeded to make the entry despite the caveat was still enforced and subsisting, it unilaterally removed the plaintiff's caveat which offended s 175 of the Code, which prohibits the registrar from making any entry on the land register as long as a caveat remained in

- A force. Such action by the registrar in registering the transfer when there was an existing caveat was also inconsistent with s 177 of the Code (see para 19).
- B (2) The plaintiff had an equitable interest of a contractual nature in the land pursuant to the SPA entered. She could protect such interest by lodging a caveat in the land register which she did. The caveat lodged by the plaintiff on the said land was good unless formally removed. The defendants should not be allowed to challenge the validity of the SPA at this stage to cover up mistakes and errors committed by the registrar of lands and surveys in registering the transfer of the said land (see paras 30 & 35).
- C (3) The plaintiff was aggrieved by the acts or mistakes of the registrar of lands and surveys in wrongly registering the MOT when the plaintiff's caveat was still subsisting. The plaintiff was entitled for damages against the second defendant. The declaratory relief sought by the plaintiff was valid based on the clear provision of the law (see paras 40–41).
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[Bahasa Malaysia summary]

- E Plaintiff, seorang rakyat Filipina, telah memasuki perjanjian jual beli ('PJB') dengan seorang yang bernama Pang Neng Ung ('penjual') bagi belian sebidang tanah ('tanah') pada harga belian sebanyak RM338,000. Penjual telah mencaj tanah tersebut kepada American International Assurance Company Ltd ('pemegang gadaian') berdaftar dengan Pejabat Pendaftar Tanah Kuching ('caj tersebut'). Apabila penjual mengingkari pinjamannya, pemegang gadaian memperoleh perintah terhadap jualan tanah tersebut untuk memenuhi jumlah yang terhutang kepada pemegang gadaian. Plaintiff memberitahu pemegang gadaian untuk menebus tanah tersebut dan mencadangkan untuk membayar baki harga belian sebanyak RM300,000. Walaubagaimanapun,
- F tiada jawapan diterima daripada pemegang gadaian. Selepas itu, plaintiff memasukkan kaveat ke atas tanah tersebut. Dengan perintah mahkamah itu, tanah tersebut telah dijual dengan harga sebanyak RM373,838 dan dipindahkan kepada seorang bernama Jackson Pui Nyan Tat ('pembeli'). Pendaftar tanah dan ukur ('defendan pertama') mendaftarkan memorandum pindah ('MP') dengan Pejabat Pendaftar Tanah Kuching. Plaintiff berhujah bahawa tindakan defendan pertama dengan mendaftarkan MP tersebut memihak pembeli adalah salah kerana kepentingan ekuiti plaintiff ke atas tanah tersebut adalah sama sekali dilenyapkan di bawah PJB tersebut dan dia dinafikan dengan kepentingan ekuitinya ke atas tanah tersebut. Plaintiff memohon periystiharan bahawa Kerajaan Negeri Sarawak ('defendan kedua') bertanggungjawab untuk membayar plaintiff untuk kerugian atau penafian kepentingan ekuitinya ke atas tanah tersebut akibat tindakan defendan pertama berikutan s 197 Kanun Tanah Sarawak ('Kanun'); dan perintah untuk bayaran pampasan dalam jumlah sebanyak RM292,000.
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Diputuskan, membenarkan permohonan dengan kos sebanyak RM5,000:

- (1) Apabila pendaftar meneruskan untuk membuat kemasukan meskipun kaveat masih berkuat kuasa dan wujud, ia secara unilateral memotong kaveat plaintif yang melanggar s 175 Kanun, yang melarang pendaftar daripada membuat apa-apa kemasukan ke atas pendaftar tanah asalkan kaveat kekal berkuat kuasa. Tindakan sedemikian oleh pendaftar dalam mendaftar pemindahan apabila terdapat kaveat yang wujud adalah juga tidak konsisten dengan s 177 Kanun (lihat perenggan 19).
- (2) Plaintif mempunyai kepentingan ekuiti yang bersifat kontrak dalam tanah tersebut berikutan PJB yang dimasuki. Dia dapat melindungi kepentingan sedemikian dengan memasukkan kaveat dalam pendaftar tanah yang mana dibuatnya. Kaveat yang dimasukkan oleh plaintif atas tanah tersebut adalah betul kecuali dipotong dengan rasmi. Defendan-defendan tidak patut dibenarkan untuk mencabar kesahan PJB tersebut pada peringkat ini untuk menutup kesalahan atau kesilapan yang dilakukan oleh pendaftar tanah dan ukur dalam mendaftar pemindahan tanah tersebut (lihat perenggan 30 & 35).
- (3) Plaintif tidak berpuas hati dengan tindakan atau kesilapan pendaftar tanah dan ukur dengan secara salah mendaftar MP apabila kaveat plaintif masih wujud. Plaintif berhak kepada ganti rugi terhadap defendan kedua. Relief perisytiharan yang dipohon oleh plaintif adalah sah berdasarkan peruntukan jelas undang-undang (lihat perenggan 40–41).]

Notes

For cases on caveat, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4921–4945.

Cases referred to

- Arab-Malaysian Finance Bhd v Leong San Voon & Anor* [1993] MLJU 341; [1993] 3 CLJ 21, HC (refd)
- Forster v Finance Corporation of Australia Ltd* [1980] VR 63, SC (refd)
- Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, CA (refd)
- Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96, FC (refd)
- Stewart v District Land Registrar* [1980] 2 NZLR 706, HC (refd)
- Supreme Finance (M) Bhd v Chandan Daya Sdn Bhd & Anor* [1991] 1 CLJ 386, HC (refd)

Legislation referred to

- Land Transfer Act 1952 [NZ] ss 141, 141(1), (2)
- National Land Code
- Sabah Land Ordinance (Cap 68)
- Sarawak Land Code (Cap 81) ss 13A, 13B, 13C, 13E, 13E(2)(c), 132, 137, 175, 177, 197, 201

A *Ronald Ong (Sandhu & Co Advocates) for the plaintiff.*
Mcwillin Jiok (State Legal Officier, Attorney General's Chamber) for the
defendants.

Alwi Abdul Wahab JC:

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INTRODUCTION

[1] This is the plaintiff's originating summons claiming for the following reliefs:

- C (a) declaration that the State Government of Sarawak ('the second defendant') is liable to compensate the plaintiff for the loss or deprivation of her equitable interest in all that parcel of land situate at Jalan Dogan, Batu Kawa, Kuching, containing an area of 557.8 square meters, more or less, and known as Lot 2726, Block 218, Kuching North Land District ('the said land') by reason of the registration by the registrar of the lands and surveys ('first defendant') vide memorandum of transfer ('the MOT') affecting the said land at the Kuching Land Registry Office as instrument No L 1345/2013 on 15 January 2013; and
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- E (b) an order for payment of compensation in the sum of RM292,000 or such other sum as assessed by the deputy registrar.

THE FACTS

F [2] By the sale and purchase agreement dated 1 April 2010 ('the SPA') entered into between one Maria Rochele Silva Sarabia, a Philippines citizen ('the plaintiff') and one Pang Neng Ung ('the vendor') for the purchase of the said land for the sum of RM338,000. Prior to the SPA, the vendor charged the said land to American International Assurance Company Ltd ('the chargee') registered with Kuching Land Registry Office as instrument No L 18996/2006 on 3 August 2006 ('the said charge'). As the vendor was defaulted in servicing his loan, an order for sale of the said land was obtained by the chargee on 19 August 2009 to satisfy a sum of RM381,644.75 due and owing to the chargee.

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[3] When the plaintiff became aware that the vendor had been adjudged bankrupt on 11 July 2011, she wrote a letter to the chargee to redeem the said land and proposed to pay the balance of the purchase price of RM300,000 but there was no reply from the chargee. In order to protect her interest over the said land, the plaintiff lodged a caveat under instrument No L 21387/2011 which was registered at the Kuching Land Registry Office on 9 August 2011 ('the caveat').

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[4] Pursuant to court's order dated 26 July 2011, the chargee caused a notice of sale dated 13 September 2011 to be advertised in the local newspaper. By the court's order, the said land was sold and transferred to one Jackson Pui Nyan Tat ('the purchaser') for RM 373,838. Notwithstanding the plaintiff's caveat dated 9 August 2011 still subsisting on the land register, the first defendant registered the MOT with Kuching Land Registry Office on 15 January 2013.

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[5] Hence, it was the plaintiff's case that the first defendant's act of registering the MOT on 15 January 2013 in favour of the purchaser was wrongful as the plaintiff's equitable interest in the said land was completely extinguished under the SPA. In other words the plaintiff is barred from bringing an action against the purchaser for the recovery of the said land due to the purchaser's indefeasible title obtained upon successful registration. The plaintiff's claim against the second defendant was for the recovery of damages as a result of the first defendant's act pursuant to s 197 of the Sarawak Land Code (Cap 81) ('the Land Code').

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THE LAW

[6] Section 197 of the Land Code:

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Any person who is deprived of any land, or of any estate or interest therein, by reason of any of the provisions relating to indefeasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.

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[7] In the context of the above provision, it is clear that any person who is deprived of any interest of any land by reason of the provisions relating to indefeasibility which resulted in that person being barred from bringing an action against the registered proprietor for possession, or for the recovery of that land, may bring an action against the government for recovery of damages.

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THE PLAINTIFF'S CASE

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[8] It is the plaintiff's case that she was deprived of her equitable interest in the said land due to the acts or mistakes of the first defendant in registering the MOT favouring the purchaser despite the subsisting caveat lodged by her. By registering the transfer, the registrar had contravened s 175 of the Land Code which states that so long as a caveat remains in force, the registrar shall not make any entry on the land register having the effect of transferring or otherwise affecting the interest in respect of which the caveat may have been lodged. The immediate consequence of the registrar's act was that the plaintiff's caveat was arbitrarily and unilaterally removed by the registrar without

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- A following the statutory process provided for under s 177 of the Land Code which requires a formal application to be made to the High Court for the removal of a caveat.
- B [9] Learned counsel for the plaintiff referred to s 141 of the New Zealand's Land Transfer Act 1952 which has similar effect with s 175 of the Land Code. Sections 141(1) and (2) of the New Zealand's Land Transfer Act 1952 provides:
- C (1) Subject to the succeeding provisions of this section, so long as a caveat under section 137 remains in force, the Registrar shall not make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat.
- D (2) Subsection (1) shall not prevent the Registrar from making any entry necessary to complete the registration of an instrument that has been accepted for registration before the receipt of the caveat.
- E [10] He referred to the case of *Stewart v District Land Registrar* [1980] 2 NZLR 706 where the Auckland High Court had considered the above provision. It was held in that case that the district land registrar was correct in requiring the removal of a caveat before registering a transfer to a purchaser of a land sold pursuant to a mortgagee's exercise of its power of sale. The court further held that on the clear wording of s 141, the registrar was right to prohibit himself from making any entry on the register, such as registering of a transfer, which would have the effect of 'charging or transferring or otherwise affecting the estate or interest protected by the caveat'. Learned counsel for the plaintiff also referred to an Australian case where the same principle was adopted in *Forster v Finance Corporation of Australia Ltd* [1980] VR 63. In that case, Crockett J held that: 'A mortgagee exercising his power of sale over land registered under the transfer of land act must deal with caveats before the transfer to the purchaser can be registered'.
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- G [11] It was further pointed out by learned counsel for the plaintiff that both the court's order dated 5 July 2012 and the notice of sale dated 13 September 2011 require the sale of the said land to be made 'subject to all easements, liabilities and rights subsisting thereon and without vacant possession'.
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- I [12] Thus, the plaintiff submitted that the registration of the MOT gave the purchaser's title indefeasible under the Land Code. Most importantly, the effect of the registrar's act in registering the transfer is so crucial that the plaintiff's equitable interest in the said land was completely extinguished. This means that the plaintiff has no remedy against the purchaser for the loss and deprivation of her equitable interest due to the purchaser's indefeasibility of title being the registered owner of the said land. The registration of the purchaser's title also had the effect of barring the plaintiff from bringing an

action for specific performance for the recovery of the interest against the vendor. That being the case, the plaintiff contends that the second defendant is liable to compensate her loss or deprivation of her equitable interest which was caused by the first defendant's act under s 197 of the Land Code.

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THE DEFENDANT'S CASE

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[13] The defendant submitted that the plaintiff was not deprived of the said land because the SPA was entered on 1 April 2010 after the land was already subject to an existing memorandum of charge in favour of the chargee registered on 3 August 2006. The plaintiff also had not paid the balance of the purchase price of RM300,000 under cl 3(b) of the SPA.

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[14] The defendants contend that before the plaintiff can be said to be deprived, the said land must have been taken away from her. But the evidence shows that the plaintiff was the occupier of the said land since 2009 until she moved out in December 2011. When the MOT was registered on 15 January 2013, the plaintiff was no more in possession or custody or control in the said land. Thus, it cannot be gainsaid that the plaintiff was deprived of her said land.

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[15] The defendants further contend that the plaintiff did not take necessary action to procure the said land other than lodging a caveat although the plaintiff at all times had knowledge that the said land was put up for auction by the chargee. The fact that the plaintiff proposed to redeem the said land by agreeing to pay RM300,000 to the chargee was by no means a proper action to procure the said land.

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[16] The defendant also submitted that the recovery of damages under s 197 of the Land Code should only confine to a real or actual interest or title in the said land. In other words, equitable interest is not within the meaning intended by s 197 of the Land Code.

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WHETHER THE REGISTRAR'S ACTION IN REGISTERING THE MOT CONTRAVENED S 175 OF THE LAND CODE?

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[17] In the instant case, when the MOT was registered by the first defendant on the 15 January 2013, the plaintiff's caveat registered on 9 August 2011 still remains in force. During the hearing of this case, I had enquired both learned counsel whether there is any Malaysian cases on this issue ie the claim against the government for the action done by its employee in registering the transfer under the MOT into the land register when the caveat is still subsisting. To my surprised, there was none.

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[18] As confirmed by both counsel for the plaintiff and defendants, there is

- A no similar provision like s 197 of the Land Code under the National Land Code and the Sabah Land Ordinance. This could probably explain on the dearth of case law in Malaysia on this point. Following the principle in the New Zealand's case ie *Stewart v District Land Registrar* and an Australian case ie *Forster v Finance Corporation of Australia Ltd* cited by the plaintiff's counsel,
- B I am constraint but to follow the decision in that cases that the registrar ought to refuse in making the entry of the transfer on the land register unless the caveat is removed.
- C [19] In the instant case, when the registrar proceeded to make the entry despite the caveat is still enforced and subsisting, this action would unilaterally remove the plaintiff's caveat which offended s 175 of the Land Code. Section 175 of the Land Code prohibits the registrar from making any entry on the land register as long as a caveat remains in force. Such action by the registrar in
- D registering the transfer when there was an existing caveat was also inconsistent with s 177 of the Land Code which provides for the procedure for the removal of the caveat.
- E [20] In view of my finding above, the next question to be asked is whether the registrar's action had caused the plaintiff's deprivation of her equitable interest over the said land pursuant to s 197 of the Land Code. But before that it should be first determine whether the SPA entered on 1 April 2010 was valid under the law.
- F WHETHER THE SPA ENTERED ON 1 APRIL 2010 WAS VALID UNDER THE LAW?
- G [21] In this connection, the defendants submitted that the plaintiff, being a Philippines citizen, could not acquire interest or equitable interest over the said land pursuant to ss 13A, 13B and 13C of the Land Code. Thus, no interest or equitable interest passes from the vendor to the plaintiff.
- H [22] The plaintiff argued that the defendants were precluded from challenging the legality of the SPA because there was a clear admission by the registrar of the lands and surveys department, one Norshaherma bt Kolek ('DW1') who gave evidence previously in the magistrates court Case No KCH-A72-787/5 of 2013. In the magistrate court's case, the plaintiff, Jackson Pui (the purchaser in the instant case) filed a civil claim against the defendant,
- I Maria Rochele Silva Sarabia (the plaintiff in the instant case) for the alleged damages in respect of Lot 2726, Block 218, Kuching North Land District (ie the said land in the instant case). DW1 was called by the defendant in the magistrate court's case and her evidence (in cross-examination by the plaintiff in the magistrate court's case) is reproduced for ease of reference:

- Q: If that is the case, can you please tell the court can a non-Malaysian citizen acquire or hold this particular property Lot 2726? **A**
- A: Yes because it falls under exception of section 13E of the Sarawak Land Code.
- Q: Where is that document in support of your caveat? **B**
- A: By virtue of registering the caveat number 121387/2011 it can be said that Ms Maria as a foreigner can hold Lot 2726 as the property falls under section 13E(c).
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- ...
- Q: Do you know for a fact it falls under section 13E(2)(c) or you assume because the caveat was there before? **C**
- A: Because I already check the record. **D**

[23] In the magistrates' court, the plaintiff's claim was dismissed by the learned magistrate. The notes of proceeding on DW1's evidence in the magistrates' court is marked as 'MR-13' exhibited in the affidavit-in-reply (2) in the instant case. **E**

[24] In DW1's evidence in the magistrate court's above who was the registrar of the lands and surveys department, she stated that the plaintiff in the instant case could acquire the said land although she is a foreigner as it falls under s 13E(2)(c) of the Land Code. She further testified that she knew it for a fact that the plaintiff's case falls under s 13E(2)(c) as she had already check the record. This particular sworn evidence given by the officer of the lands and surveys in the earlier proceeding in the magistrate court's was not specifically challenged by the defendants' affidavit in the instant case. In para 5 of the defendants' affidavit-in-opposition (3), the defendants merely stated the evidence given by Puan Norshaherma bt Kolek in the magistrates' court was only her own opinion regarding the application of s 13E of the Land Code. In my view, there should be a clear rebuttal by the defendants by producing evidence or records which Norshaherma claimed to have seen and checked and to give some explanation of her previous sworn evidence and to rectify the mistakes if necessary. It is therefore, the plaintiff's case that she acquired the said land through the SPA and she lodged a caveat thereafter to protect her interest was consistent with Norshaherma's evidence that the plaintiff had fulfilled the requirements under s 13E(2)(c) of the Land Code. This evidence must be accepted in the absence of any contradictory evidence by the defendants (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). **F**
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[25] Section 13E(2)(c) of the Land Code provides as follow:

- A (2) Notwithstanding anything to the contrary in this code or other written law relating to land, a foreign person, a foreign company, foreign corporation or other foreign body may acquire an estate, interest or right in –
- B (c) any land with a building thereon for residential purpose and the market value of such land and building is not less than such amount as may be determined by the Minister by a direction *published in the Gazette.
- *not less than RM300,000 (Ringgit Malaysia three hundred thousand) see Swk LN 114/98.
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- D [26] Paragraph 3 of the *Land (Market Value of Property for Foreign Acquisition), Direction, 1998* which was published in *Sarawak Gazette No Swk LN 114* on 17 December 1998 ('Swk LN 114') provides that a foreigner may acquire land and building thereon under s 13E(2)(c) if the market value of the land is not less than RM300,000 (ex 'DR4' of the affidavit-in-opposition (3)).
- E [27] By para 2 of the *Land (Market Value of Property for Foreign Acquisition) (Amendment) Direction, 2013* which was published in *Sarawak Gazette No Swk LN 148* and came into force on 29 March 2010 ('Swk LN 148'), para 3 of Swk LN 114 was amended to the effect that a foreigner may acquire land in Kuching Division if the market value of the land is not less than RM350,000 (ex 'DR3' of the affidavit-in-opposition (3)).
- F [28] Learned counsel for the defendants submitted that, even though Swk LN 148 was gazetted in 2013 ie after the date of SPA 1 April 2010, the plaintiff must prove that the market value of the said land shall not be less than RM300,000 (the market value determined by the minister in Swk LN 114) before the SPA entered. It is clearly provided under the Swk LN 148 that the direction came into force on 29 March 2010 and the SPA in the instant case was executed on 1 April 2010 for a consideration of RM338,000. Be that as it may, whether the amount of RM338,000 was the market value of the said land in question or whether there was non-compliance of both directions (Swk LN 114 and Swk LN 148), do not really matter in view of the evidence by
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- H Norshaherma that the land acquired by the plaintiff fell under s 13E(2)(c) of the Land Code based on the record available. That being the case, and for the reason that the evidence of Norshaherma was not challenged, this evidence still stand before this court.
- I [29] Learned counsel for the defendants also submitted there was nothing shown by the plaintiff to indicate that she had obtained the confirmation from the authorised officer of the value of the said land for the purpose of acquisition (para 4 of Swk LN 114). In this regards, the plaintiff submitted which I agree, the direction does not impose any obligation on the plaintiff to get a market

valuation of a property and to seek confirmation from an officer of the lands and surveys prior to acquiring the said land. Similarly, s 13E(2)(c) of the Land Code does not prescribe the requirements which have to be complied by the plaintiff as suggested by the defendants.

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[30] In the light of Norshaherma's evidence in the magistrates' court, the SPA which was entered by the plaintiff on 1 April 2010 was valid under the law. The validity of this SPA was not challenged neither did the caveat lodged by the plaintiff on 9 August 2011 which was still subsisting when the MOT was registered on 15 January 2013. It is ludicrous for the defendants to challenge the validity of the SPA at this stage and the caveat was lodged based on the interest acquired from the SPA. The caveat lodged by the plaintiff in respect of the said land was as good as now unless formally removed. The plaintiff's caveat was however ignored by the first defendant to give way to the MOT in breach of the plain provision of s 175 of the Land Code. The defendants should not be allowed to challenge the validity of the SPA at this stage to cover up the mistakes and errors committed by registrar of the lands and surveys in registering the transfer of the said land in the land register book pursuant to the said s 175 of the Penal Code.

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THE DEFENDANTS' DEFENCE

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[31] In defending the first defendant's action, learned counsel submitted that the MOT was rightly registered pursuant to the court's order dated 5 July 2012. I find that there was no basis in his submission reading from para 3 of the said court's order dated 5 July 2012 which reads:

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that upon the registration of the said Memorandum of Transfer, all the rights, title and interest in the said property shall subject to all easement, liabilities and rights subsisting thereon, and without vacant possession as stated in the Notice of Sale of the said property dated 13.9.2011.

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[32] The court's order dated 5 July 2012 clearly subjected the registration of the MOT to all easement, liabilities and rights subsisting thereon, and without vacant possession. Thus, the court's order 5 July 2012 and notice of sale dated 13 September 2011 cannot be used as defence to the wrongful registration of the transfer by the registrar of the lands and surveys.

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EQUITABLE INTEREST

[33] The counsel for the defendant also submitted that the plaintiff cannot obtain equitable interest unless she had performed an obligation to pay the total purchase price stated in the SPA. Clause 3(b) of the SPA provides for the payment of the balance of purchase price of RM300,000 by the plaintiff. Learned counsel for the plaintiff pointed out that this issue on whether the

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A plaintiff had performed an obligation by paying the balance of the purchase price was not an issue as it was never raised in the defendants' affidavit. As such, I would disregard this issue raised by the defendants. In any event, the plaintiff's obligation to make the final payment of the purchase price was on 31 July 2014 which was not yet due at all material times.

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[34] Learned counsel for the defendants further submitted that the interest acquired by the plaintiff was only an equitable interest of a contractual nature in the land as against the vendor but such interest is no good against the chargee ie American International Assurance Company. In other words, it is a right against the vendor personally but not good against the whole world (*Supreme Finance (M) Bhd v Chandan Daya Sdn Bhd & Anor* [1991] 1 CLJ 386). Learned counsel for the defendants also cited the case of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; [1971] 1 LNS 96 where Gill FJC stated that the plaintiff as a purchaser did not obtain an equitable title to the land by virtue of the sale agreement but he would have obtained an equitable interest of a contractual nature in the land which he could protect by a restrictive entry in the land register; that in short, he had acquired a caveatable interest in the land.

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[35] Guiding by the above authorities, the plaintiff had an equitable interest of a contractual nature in the land pursuant to the SPA entered on 1 April 2010. She could protect such interest by lodging a caveat in the land register which she did.

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[36] The defendants submit that equitable interest does not confer a right of a cause of action to the plaintiff against the government under s 197 of the Land Code. I disagree with the defendants on this in view of the express provision of s 197 of the Land Code that covers the deprivation and loss of 'any interests' which may include equitable interest in the said land as a result of the indefeasibility provisions. Relying on s 175 of the Land Code, so long as the plaintiff's caveat is still subsisting, the transfer ought not to be registered otherwise it arbitrarily and illegally extinguishing the plaintiff's equitable interest as a result.

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WHETHER THE PLAINTIFF IS ENTITLED TO RECOVERY OF DAMAGES UNDER S 197 OF THE LAND CODE?

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[37] The next issue to be dealt with is whether the registrar's action in registering the MOT had caused the plaintiff's deprivation of her equitable interest over the said land pursuant to s 197 of the Land Code.

[38] Due to the registrar's wrongful registration, the plaintiff's equitable interest was extinguished as the purchaser's title was indefeasible. In other

words, the registering of title to the purchaser conferred him indefeasibility of title by operation of the indefeasibility provision under s 132 of the Land Code. The effect of this indefeasibility barred the plaintiffs from bringing an action against the purchaser as the title once registered is good against the world and cannot be defeated by any subsisting or competing equitable interests in the land prior to the said act of registration.

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[39] In *Arab-Malaysian Finance Bhd v Leong San Voon & Anor* [1993] MLJU 341; [1993] 3 CLJ 21, where the court held as follows: 'The plaintiff being ... in the position of a registered proprietor of an interest therein, would have attained an indefeasible title against the world under s 132 of the Sarawak Land Code in the absence of fraud'.

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[40] The defendants submit that the declaratory relief sought by the plaintiff cannot be granted by this honourable court as the plaintiff has yet to utilise alternative remedy provided in cl 7 of the SPA. In the event of breach by the vendor to transfer the said land to the plaintiff, cl 7 of the SPA provides for remedy to the plaintiff to be compensated. In reply, the plaintiff contends that s 197 does not require the plaintiff to satisfy this court that all available recourse has been exhausted before she is entitled for a declaratory relief sought under s 197 of the Land Code. I agree with the plaintiff that there is no such condition stipulated under s 197 of the Land Code to that effect as suggested by the defendants.

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[41] In the instant case, the plaintiff was aggrieved by the acts or mistakes of the registrar of lands and surveys in wrongly registered the MOT when the plaintiff's caveat was still subsisting. Hence under s 197 of the Land Code, she is entitled for recovery of damages against the second defendant ie Government of Sarawak. There has been a clear infringement of the Land Code provision by the registrar in extinguishing and depriving the plaintiff's equitable rights as a result of the registration of the MOT.

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[42] In my view, the declaratory relief sought for by the plaintiff is valid based on the clear provision of the law. In the circumstances of this case, it is proper for me to allow such relief. In view of my finding, I now move to consider the amount of damages which the plaintiff is entitled to.

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DAMAGES

[43] The compensation provision is provided under s 201 of the Land Code and it states:

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No person shall, against the government, be entitled to recover any greater amount for compensation in respect of the loss or deprivation of any land, or any estate or interest therein, than the value of that land, estate or interest at the time of that

A deprivation, together with the value of the permanent buildings erected thereon and any improvements made thereto prior to the time of that deprivation, with interest at the rate of five per cent per year to the date of the judgment recovered.

B [44] The defendants submit that damages under s 201 of the Land Code must mean actual damages and not mere damages. It was further submitted that the damages if awarded would unjustly enrich the plaintiff as she had not paid the balance purchase price of RM300,000. The plaintiff submits that she is entitled for damages in the sum of is RM292,000, the loss of capital gain in the value of the said land as a result of the deprivation of her equitable interest calculated on the date of deprivation. The sum of RM292,000 is calculated as follows:

C The value of purchase price based on SPA : RM338,000
D The value of the said land at the time of deprivation on 15 January 2013 : RM630,000

The plaintiff's entitlement for compensation : RM292,000

E [45] Learned counsel for the defendants did not dispute as to how the compensation is to be calculated under s 201 of the Land Code but submitted that the amount claimed ought not to be considered as the plaintiff had not suffered such loss.

F [46] In my view, in computing the fair and correct amount of damages, the court should consider the purchase price of the said land by the purchaser ie of RM373,838. Thus, plaintiff is only entitled for RM35,838 (RM373,838 – RM338,000 = RM35,838). In my view this amount is reasonable as compared to RM229,000 which is too excessive and this may result in undue enrichment to the plaintiff.

CONCLUSION

H [47] In conclusion, the plaintiff's originating summons is allowed in terms in the sum of RM35,838 to be paid in compensation for the loss and deprivation of the plaintiff's equitable right over the said land.

I [48] Parties had indicated before me that the cost for this application shall be agreed in the sum of RM5,000 payable to the plaintiff. I hereby so ordered.

Application allowed with costs of RM5,000.

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Reported by Afiq Mohamad Noor

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